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Nos. 98-684 and 98-706

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF IDAHO, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY L. HOAGLAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an executive order entitled Public Water Reserve No. 107, 43 C.F.R. 292.1 (1938), created a federal reserved water right to satisfy the stock watering needs of persons who graze livestock on public lands.

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No. 98-684

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v.

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No. 98-706

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App.[1] 1-12) is reported at 959 P.2d 449. The opinion of the district court (Pet. App. 13-27) is unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on April 6, 1998. A petition for rehearing was

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[1] Citations to "Pet. App." are to the appendix in No. 98-684.

initially denied on July 29, 1998, and the Idaho Supreme Court issued an amended order to that same effect on October 15, 1998, "nunc pro tunc July 29, 1998" (Pet. App. 29). The petition for a writ of certiorari in No. 98-684 (Idaho Pet.) was filed on October 26, 1998. The petition for a writ of certiorari in No. 98-706 (Hoagland Pet.) was filed on October 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

Petitioner State of Idaho has initiated a general stream adjudication of the Snake River Basin and has joined the United States as a defendant under the McCarran Amendment, 43 U.S.C. 666. See *United States* v. *Idaho*, 508 U.S. 1 (1993). In the course of this litigation, known as the Snake River Basin Adjudication (SRBA), the United States and other parties have filed numerous water rights claims, and the district court has identified and resolved some of the issues that involve "Basin-wide" concern. Among the claims filed, the United States has asserted federal reserve water rights for stockwatering purposes based on an executive order known as the Public Water Reserve No. 107 (PWR 107), 43 C.F.R. 292.1 (1938) (Pet. App. 26-27); Clerk's R. 95. The district court rejected those claims on the ground that PWR 107 did not reserve a water right. Pet. App. 13-27. The Idaho Supreme Court reversed the district court's ruling. *Id.* at 1-12.

1. The public lands of the United States have long been used for grazing livestock, first as a "public common," *Buford* v. *Houtz*, 133 U.S. 320, 326-328 (1890), and later as rangelands that are actively managed pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Even during the era of the grazing common, the federal government enacted statutes and issued execu-

tive orders to protect the use of the rangelands. One of these executive orders is PWR 107, issued by President Coolidge on April 17, 1926. It states:

ORDER OF WITHDRAWAL

PUBLIC WATER RESERVE NO. 107

> [E]very smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole, located on unsurveyed public land, be and the same is hereby, withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the Act of December 29, 1916.

43 C.F.R. 292.1 (1938) (Pet. App. 26-27); Clerk's R. 95.[2]

a. Reservations have long been used by the United States to dedicate federal lands to specified public uses. The federal government's authority to make reservations and withdrawals from the public lands derives from the Property Clause of the Constitution, U.S. Const. Art. IV, § 3, Cl. 2, which provides that Congress shall have the power to dispose of and make all needful laws regarding the property belonging to the United States. See, *e.g.*, *Light* v. *United States*, 220 U.S. 523

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[2] The statute cited at the end of the order is the Stock Raising Homestead Act (SRHA), 43 U.S.C. 291 *et seq.* Section 10 of the SRHA authorized the President to reserve lands "containing water holes or other bodies of water needed or used by the public for watering purposes." Ch. 9, 39 Stat. 865, 43 U.S.C. 300 (repealed 1976).

(1911).[3] Some reservations, such as those for national parks, have been created by Acts of Congress. See, *e.g.*, 16 U.S.C. 21. Many other reservations, however, including reservations for national forests, wildlife refuges, and the public water reserve at issue here, have been created by presidential executive order. See *United States* v. *Payne*, 8 F. 883 (W.D. Ark. 1881).

Until 1976, the President had extremely broad statutory authority to withdraw and reserve public lands.[4] Congress curtailed much, but not all, of that statutory authority through the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.* See FLPMA, Pub. L. No. 94-579, § 704, 90 Stat. 2792; see also § 204, 90 Stat. 2751, 43 U.S.C. 1714 (1976). At that time, Congress limited the Executive Branch's authority to make future withdrawals. The savings provision in FLPMA stipulated, however, that withdrawals and reservations existing at the time of its

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[3] A "withdrawal" removes public lands from availability for private acquisition. See *United States* v. *Wilbur*, 283 U.S. 414, 419 (1931); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471 (1915). A "reservation" is the dedication of withdrawn land to a specified purpose. See *United States* v. *New Mexico*, 438 U.S. 696 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976).

[4] In numerous Acts, Congress had delegated to the Executive Branch both general and specific withdrawal and reservation authority. Some examples of specific authority include the Antiquities Act of 1906, 16 U.S.C. 431, the Federal Power Act, 16 U.S.C. 818, and the Sanctuaries Act, 16 U.S.C. 694. Congress provided a general grant of withdrawal authority in 1910 with the enactment of the Pickett Act, ch. 421, 36 Stat. 847, 43 U.S.C. 141 (repealed 1976). The President could also make lawful withdrawals without express statutory authority. See *United States* v. *Wilbur*, 283 U.S. at 419; *United States* v. *Midwest Oil Co.*, 236 U.S. at 469-471.

enactment remain in effect. FLPMA § 701(c), 90 Stat. 2786, 43 U.S.C. 1701 note.

b. Long before the issuance of PWR 107, Congress had become aware that large ranching operations were using various methods to control vast areas of public lands by gaining control of areas containing the limited water sources. See *Improvement and Regulation of Grazing on the Public Lands of the United States: Hearings on H.R. 19857 Before the House Comm. on Public Lands*, 62d Cong., 2d Sess. 80 (1912). In 1916, Congress directly addressed that problem through Section 10 of the Stock Raising Homestead Act (SRHA), ch. 9, 39 Stat. 865, 43 U.S.C. 300 (repealed 1976). Section 10 prevented stock watering holes from being patented to homesteaders and expressly authorized the President to reserve "lands containing water holes or other bodies of water needed or used by the public for watering purposes." It delegated regulation of this program to the Secretary of the Interior. *Ibid.*[5]

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[5] Section 10 stated:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act [for entry] but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten [the Pickett Act], and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder.

39 Stat. 865, 43 U.S.C. 300 (repealed 1976). See also H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916). ("[Section 10] authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and

Following the enactment of Section 10, the Secretary of the Interior prepared PWR 107 as a proposed executive order for the President. The Secretary stated that PWR 107 was necessary to prevent private persons from obtaining exclusive use of springs and water holes on the public domain, noting additionally that the withdrawal was "advisable" due to the "pendency of grazing legislation" that later was enacted as the Taylor Grazing Act.[6] On April 17, 1926, President Coolidge issued PWR 107, an executive order that specifically "reserved for public use"

> [e]very smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land.

43 C.F.R. 292.1 (1938) (Pet. App. 26-27); Clerk's R. 95.

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other bodies of water that are necessary for large surrounding tracts of country; so that a person cannot monopolize or control large territory by locating as a homestead the only available water supply for stock in that vicinity.").

[6] Secretary Work wrote to President Coolidge:

> The control of water in the semiarid regions of the west means control of the surrounding grazing areas, possibly in some regions of millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain [*i.e.*, the Taylor Grazing Act, eventually enacted in 1934, 43 U.S.C. 315 *et seq.*], it is believed important to retain the title to and supervision of such springs and water holes on the unreserved public lands as have not already been appropriated.

Letter from Secretary of the Interior Work to President Coolidge (Apr. 17, 1926) (submitting PWR 107 as a proposed order)(Clerk's R. Exh. 25).

From the drafting of PWR 107 to the present, the Department of the Interior—the agency responsible for management of the public rangelands and implementation of PWR 107—has consistently interpreted PWR 107 as having effected a reservation of springs and water holes on the public lands. The original regulations issued with respect to PWR 107, which were contained in Instructions issued in May 1926 by the Commissioner of the General Land Office, construed PWR 107 as having withdrawn springs and water holes for "watering purposes":

> It [PWR 107] *withdraws those springs and water holes* capable of providing enough water for general use *for watering purposes.*

Selections, Filings, or Entries of Lands Containing Springs or Water Holes—All Prior Instructions Amended, Circular No. 1066, 51 Interior Dec. 457 (1926) (emphasis added) (Clerk's R. Exh. 26). The applicable regulations subsequently issued by the Secretary likewise identified the same scope and purposes for PWR 107:

> The Executive order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. * * * *It withdraws those springs and water holes* capable of providing enough water for general use *for watering purposes.*

43 C.F.R. 292.2 (1938) (emphasis added).[7]

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[7] The Solicitor of the Interior's opinions have similarly construed the scope of PWR 107. See *Compliance by the Department with State Laws Concerning Water Rights, Sol. Op. M-33969* 6 (Interior Dec. Nov. 7, 1950) (PWR 107 "withdr[ew] such water

2. Petitioner State of Idaho has enacted legislation requiring a general adjudication of water rights in the Snake River Basin within the State's borders. Idaho Code § 42-1406A(1) (1990 & Supp. 1998). Idaho has joined the United States as a party in the Snake River Basin Adjudication (SRBA) pursuant to the McCarran Amendment, 43 U.S.C. 666. See *United States* v. *Idaho*, *supra*; *In re Snake River Basin Water Sys.*, 764 P.2d 78 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989). In response, the United States has filed water rights claims under federal and state law.

a. The United States has filed, on behalf of the Department of the Interior's Bureau of Land Management (BLM), approximately 11,000 federal reserved water right claims based on PWR 107 for stockwater purposes. The BLM asserts those water rights primarily for the benefit of its Taylor Grazing Act permittees, who graze livestock on public lands. The BLM's maintenance of those rights ensures that water will be perpetually available for stockwater purposes by whichever member of the public happens at any time to

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generally from private appropriation") (Clerk's R. Exh. 30); *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, Sol. Op. M-36914*, 86 Interior Dec. 553, 580 (1979) ("This blanket withdrawal had the effect of reserving not only the *land*, but also the *water* for public use.") (Clerk's R. Exh. 31); 86 Interior Dec. at 581 ("The 1926 reservation was *designed to prevent this private monopolization of water on the public domain.* The means used was the traditional and most effective way of preserving resources on the public domain, *i.e.*, restricting entry by withdrawing the land and thus *maintaining the water thereon open and free for public use.*") (emphasis added); *Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, Sol. Op. M-36914 (Supp. II)*, 90 Interior Dec. 81, 83 (1983) (Clerk's R. Exh. 32).

have the grazing permit for the lands containing the relevant springs or water holes. In the absence of the government's reservation or appropriation of the water, the water would be available for private appropriation, to the exclusion of the public and to the potential detriment of the federal grazing permittees.

b. In conducting the SRBA, the district court periodically has designated "Basin-Wide Issues," in order to address significant legal questions before issuing a final decree. At the request of a few SRBA water right claimants, the district court designated Basin-Wide Issue No. 9:

> Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.

Clerk's R. 77. Following briefing and a hearing, the district court ruled that PWR 107 does not provide a valid basis for a federal reserved water right. Pet. App. 13-27. The court stated that PWR 107 "withdraws from entry public lands which surround water sources in order to keep homesteaders from controlling large land tracts by settling around the only water supply available for public use," *id.* at 13-14, but it concluded that PWR 107 does not constitute either an express or implied reservation of water, *id.* at 25.

c. By unanimous decision, the Idaho Supreme Court reversed. Pet. App. 1-12. The Idaho Supreme Court explained that this Court's decisions in various cases, including *Cappaert* v. *United States*, 426 U.S. 128 (1976), and *Winters* v. *United States*, 207 U.S. 564 (1908), recognize that Congress may reserve water for federal purposes expressly or by implication. Pet. App. 4-5. Under those decisions, the courts will find that a reservation of land includes an implied reservation of water if the water is needed to accomplish the purpose

of the reservation. *Ibid.* The Idaho Supreme Court explained:

> [W]here a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.

Id. at 5. The court then applied that test, "turn[ing] to an examination of PWR 107, together with its enabling legislation and the circumstances and history surrounding its creation, to determine whether a federal reserved water right exists in the present case." *Id.* at 6.

The Idaho Supreme Court found that PWR 107 evidences an "express intention by Congress" to reserve water in the statutes authorizing its issuance. Pet. App. 9. Based on its review of the text and legislative histories of those statutes and documents and circumstances surrounding the issuance of PWR 107, the court "agree[ed] with the United States and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right." *Ibid.* (citing *United States* v. *City & County of Denver*, 656 P.2d 1, 31 (Colo. 1982)). The Idaho Supreme Court concluded that "the purpose of PWR 107 would be entirely defeated" without a reserved water right, *id.* at 10, and it accordingly held that "PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering," *id.* at 11.

ARGUMENT

The Idaho Supreme Court correctly applied settled law to conclude that Public Water Reserve No. 107 created a federal reserved water right for stock-watering. The Colorado Supreme Court has reached the same conclusion, and no other state supreme court or federal court of appeals has addressed the question. The Idaho Supreme Court's decision is not only correct, but the matter has limited practical importance. There is accordingly no warrant for this Court's review.

1. This Court does not ordinarily review questions of statutory or regulatory construction in the absence of a disagreement among the federal courts of appeals or state courts of last resort. See Sup. Ct. R. 10. As petitioners concede, no such conflict exists here. See Idaho Pet. 23 n.7. No federal court of appeals has addressed the question, and the only two state supreme courts that have addressed the issue are in agreement. See Pet. App. 9; *United States* v. *City & County of Denver*, 656 P.2d 1, 31 (Colo. 1982).[8]

2. Petitioners nevertheless assert that the Idaho Supreme Court's decision "is in [d]irect [c]onflict with the [l[aw [g]overning [f]ederal reserved [w]ater [r]ights as [e]stablished by this Court in *United States* v. *New Mexico*, 438 U.S. 696 (1978)." Idaho Pet. 7; see Hoagland Pet. 7. As petitioners note, this Court's decision in

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[8] The Nevada State Engineer has also recognized reserved water rights claims made by the United States under PWR 107. See Nevada State Engineer's Notice and Order Fixing and Setting Time and Place for Inspection, *In re the Determination of the Relative Rights in and to the Water of Southern Monitor Valley in Nye County, Nevada* (Feb. 15, 1996). Similarly, a New Mexico district court has decreed federal reserved water rights under PWR 107 in the Red River adjudication. See *New Mexico* v. *Molybdenum Corp. of Am.*, CIV 9780-SC (D.N.M. June 11, 1992).

New Mexico recognized that Congress generally defers to the States in matters concerning the use of water. Idaho Pet. 16. The *New Mexico* decision also recognized, however, that "the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas." *New Mexico*, 438 U.S. at 715. "[W]hatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, * * * Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." *Id.* at 698.[9]

As the Idaho Supreme Court correctly explained (Pet. App. 4-5), when the United States reserves federal land from the public domain, it also reserves unappropriated water to the extent necessary to accomplish the purpose of the reservation. See *Winters* v. *United States*, 207 U.S. 564 (1908) (the federal government, by setting aside an Indian reservation, also impliedly confirmed to the Indians a reservation of a portion of the waters of the adjoining stream in order to satisfy the Indians' needs); *Arizona* v. *California*, 373 U.S. 546, 601 (1963) (rule underlying reservation of water rights for Indian reservations is equally applicable to other federal establishments). The

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[9] See also *California* v. *United States*, 438 U.S. 645, 662 (1978) (States have authority over internal waters "except where the reserved rights or navigation servitude of the United States are invoked"); *Cappaert* v. *United States*, 426 U.S.128, 145 (1976) (federal reserved water rights derive from federal reservations, and "are not dependent upon state law or state procedures").

Court stated the controlling principles in *Cappaert* v. *United States*, 426 U.S. 128 (1976):

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Id. at 138. See also *New Mexico*, 438 U.S. at 698-700; *City & County of Denver*, 656 P.2d at 17-18. The Idaho Supreme Court correctly applied those principles to this case. See Pet. App. 6-9. The court concluded, based on "the plain and ordinary words of the enabling statutes and executive order," that "PWR 107 evidences an express intention by Congress that reserves a water right in the United States." *Id.* at 9.

The Idaho Supreme Court specifically noted that Congress, through Section 10 of the Stock Raising Homestead Act (SRHA), "authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes." Pet. App. 7. Section 10, which expressly provides for reservation of land "containing water holes," 39 Stat. 865, 43 U.S.C. 300 (repealed 1976), clearly contemplates the reservation of both land and the water holes the land contains. See Pet. App. 7-8 (quoting H.R. Rep. No. 35, 64th Cong., 1st Sess. 1916)). Congress did so to ensure that individual settlers could not "monopolize or control a large territory by locating as a homestead the only available water supply for stock in that

vicinity." Pet. App. 8 (quoting H.R. Rep. No. 35, *supra*); see Pet. App. 9-10. Furthermore, the Secretary of the Interior's recommendation supporting the creation of PWR 107, "which was written in contemplation of the then pending Taylor Grazing Act of 1934, stated that the purpose of PWR 107 was to 'retain the title to and supervision of such springs and water holes.'" *Id.* at 10. "Without the reserved water right for such springs and waterholes, the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes." *Ibid.*

Contrary to petitioners' assertions, the Idaho Supreme Court's decision is consistent with this Court's decisions discussing the federal reserved water rights doctrine. In particular, there is no merit to petitioners' assertion that PWR 107 was intended "to [m]ake [w]ater on the [r]eserved [l]and [a]vailable for [p]rivate [a]ppropriation." Idaho Pet. 8. Section 10 of SRHA explicitly states Congress's intent that the "lands containing water holes or other bodies of water needed or used by the public" shall be "kept and held open to the public use for such purposes." 39 Stat. 865, 43 U.S.C. 300 (repealed 1976). That object would be thwarted if individuals could appropriate that water and exclude other members of the public. Rather, Section 10 contemplated that the federal government would reserve those water resources for the benefit of whichever members of the public who are entitled, at any given time, to use the lands containing the reserved springs and water holes.

Petitioners are also mistaken in suggesting that the Idaho Supreme Court's construction of PWR 107 should be rejected because, before the creation of PWR 107, the Interior Department had not described public

water reserves as creating a federal reserved water right. See Idaho Pet. 9-13; Hoagland Pet. 9. The important point, for purposes of interpreting PWR 107, is what the Interior Department has stated about PWR 107. In creating PWR 107, the Interior Department expressly stated that PWR 107 "withdraws those springs and water holes capable of providing enough water for general use for watering purposes." *Selections, Filings, or Entries of Lands Containing Springs or Water Holes—All Prior Instructions Amended, Circular No. 1066*, 51 Interior Dec. 457 (1926) (Clerk's R. Exh. 26). It has consistently adhered to that understanding. See 43 C.F.R. 292.2 (1938); see also note 7, *supra* (collecting Solicitor opinions).

Furthermore, petitioners are wrong in suggesting that there is an insufficient basis under *New Mexico* for finding a federal reserved water right. Idaho Pet. 15-20. Unlike many withdrawals, in which the connection between the purpose of the reservation and the necessity of water to accomplish that purpose is inferred (*e.g.*, where the purpose of a withdrawal is agricultural use), PWR 107 presents a circumstance in which the reservation's text and objectives demonstrate that water itself was at the heart of the withdrawal. Thus, the Idaho Supreme Court correctly found that an "express intention" to reserve water was clear from the enabling legislation. Pet. App. 9.

The connection between the withdrawal, its purpose, and the necessity of water to accomplish that purpose is particularly self-evident in the case of PWR 107. As described above, PWR 107 was issued for the specific purpose of protecting the public's right to use particular water resources. In urging the President to issue PWR 107, the Secretary of the Interior emphasized that "it is believed important to *retain the title to and*

supervision of such spring and water holes on the unreserved public domain." Pet. App. 8 (quoting Letter from Secretary of the Interior Work to President Coolidge (Apr. 17, 1926) (submitting PWR 107 as a proposed order) (Clerk's R. Exh. 25) (emphasis added)). Contrary to petitioners' suggestion (Idaho Pet. 15), the Secretary expressly linked PWR 107 to the need for stock use of the water. See *ibid.* (stating that the water was needed for "*grazing*" lands) (emphasis added).[10]

Petitioners are incorrect in asserting that "the language and history of the statutes upon which PWR 107 is based rebut any assertion that Congress intended to authorize or that the President did in fact reserve a water right under PWR 107 for stockwatering purposes." Idaho Pet. 15. By its terms, Section 10 of the

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[10] Petitioners are also mistaken in asserting that the Idaho Supreme Court improperly linked the United States' PWR 107 claims in the SRBA to use by Taylor Grazing Act permittees, because supposedly "the Taylor Grazing Act of June 28, 1934 * * * was only an optimistic gleam in a federal bureaucrat's eye in 1926" (Idaho Pet. 8 n.2) when PWR 107 was issued. The Secretary's letter to the President expressly recognized the need for the reservation of the springs and water holes "in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain." Pet. App. 8 & n.2 (quoting Letter from Secretary of the Interior Work, *supra*). The congressional debate over the precise form of the federal leasing program continued for several years until the 1934 enactment of the Taylor Grazing Act, but the issuance of PWR 107 was plainly linked to that legislation. The Department made clear immediately following the issuance of PWR 107 that "the order would be of material aid in event of the passage of grazing legislation of the type proposed in S. 2584," a predecessor bill to the Taylor Grazing Act. U.S. Reply Br. (Idaho Sup. Ct.) 10 (quoting Letter from First Ass't Secretary Edward Finney to Senator John Kendrick (May 5, 1926) (on file with Department of Interior, Central Classified Files 1907-1936, File 2-188, National Archives, College Park, Md.).

SRHA clearly authorizes reservations of land and water, expressly providing for reservations of land "containing water holes" and further providing for public access "to watering places reserved hereunder." 39 Stat. 865, 43 U.S.C. 300 (repealed 1976). See also Pet. App. 7-8 (quoting H.R. Rep. No. 35, *supra*) ("[Section 10] authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country; so that a person cannot monopolize or control large territory by locating as a homestead the only available water supply for stock in that vicinity.").[11]

The Hoagland petitioners additionally assert that "events" subsequent to 1926 have "terminated any need for even the reservation of land resulting from PWR 107's withdrawal of land" (Hoagland Pet. 11-12). The Hoagland petitioners identify the enactment of the Taylor Grazing Act as one such "event." *Ibid.* That argument, however, is unpersuasive. As the Idaho Supreme Court recognized, the rationale for PWR 107 rested, in part, on the government's need to retain title to springs and water holes in anticipation of the proposed grazing legislation that became the Taylor Grazing Act. Pet. App. 8 n.2. Similarly, the Hoagland petitioners' assertion that the enactment of FLPMA

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[11] There is no merit to petitioners' suggestion (Idaho Pet. 18) that the Idaho Supreme Court's decision is inconsistent with this Court's rejection of certain stockwater claims at issue in *New Mexico*. The *New Mexico* decision addressed the validity of the Forest Service's 1897 Organic Administration Act, 16 U.S.C. 473 *et seq.* (Organic Act), as a basis for federal reserved water right claims. See 438 U.S. at 706-711. That decision did not address or concern PWR 107.

"conclusively destroyed any contention that a need for reservation of water existed" (Hoagland Pet. 12) ignores that Act's unambiguous language to the contrary. FLPMA specifically addressed the issue of existing withdrawals and reservations, providing in Section 701(c) that all "withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." Pub. L. No. 94-579, 90 Stat. 2786, 43 U.S.C. 1701 note. That provision makes clear that Congress maintained intact all pre-FLPMA reservations and withdrawals, including PWR 107. See Pet. App. 11.

In sum, the Idaho Supreme Court correctly described the reserved water rights doctrine and properly applied it to the circumstances of this case by analyzing the words, meaning, and objectives of the enabling legislation and the implementing executive order. The Idaho Supreme Court's conclusion that PWR 107 created a federal reserved water right rests on a correct application of settled principles that does not warrant further review.

3. This Court's review is also unwarranted because PWR 107's creation of modest reserved rights for stock watering does not, as a practical matter, have any significant effect on water allocation within the State of Idaho. Idaho has itself recognized the right of the United States to obtain water rights on public land so that the federal government can properly manage and implement its rangeland grazing program. See, *e.g.*, Idaho Code § 42-501 (1990). The practical effect of the Idaho Supreme Court's ruling—which preserves stock-watering rights on public land—is accordingly consistent with the State's water use policies. In addition, the federal reserved water rights created by PWR 107

will be administered under the State's prior appropriation doctrine and, therefore, will not invalidate any preexisting private rights. In sum, the Idaho Supreme Court's decision will not result in any fundamental change in the use and allocation of water within the State.[12]

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[12] There is no basis in the record for petitioner State of Idaho's assertion that its own Supreme Court's decision "will displace thousands of water rights established by private individuals under Idaho law." Idaho Pet. 7; see also Idaho Pet. 21. Only a handful of individuals objected to the government's PWR 107 claims, and only a small percentage of individuals have asserted claims to state-law water rights to the same source. Moreover, all persons who could use the springs and water holes on the public rangelands, through exercise of their Taylor Grazing Act permits, benefit from the government's assertion of these water right claims, as do all potential future permittees. We note, too, that the Idaho district court has determined that very little water is at stake in these stockwater right claims, having found (1) that "[d]omestic and stock water uses collectively divert annually less than one per cent of the 36 million acre feet [of water] which leaves the state each year"; and (2) that "[t]he Idaho Department of Water Resources has not found it necessary in recent adjudications to distribute water to domestic or stock water uses because of the small amounts diverted, except for isolated headwater streams." *In re the General Adjudication of Rights to the Use of Water from the Snake River Drainage Basin Water System*, No. 39576 (Idaho Dist. Ct. Jan. 17, 1989) (Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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